Numbers 21175-A-B-C-D-E-F and 22316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

THE CALLAND CORPORATION, a corporation,

Debtor and Appellant,

vs.

UNITED INSURANCE COMPANY OF AMERICA,
WILLIAM N. BOWIE, JR.,

Appellees.

APPELLEE'S BRIEF.
(William N. Bowie, Jr.)

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Bankruptcy during the course of the Chapter XI proceedings and the subsequent adjudication of bankruptcy, all of which Orders were affirmed on review by the United States District Court for the Central District of California. Each of the Orders appealed from will be dealt with separately hereafter and referred to numerically in accordance with those designations set forth in the Appellant's Brief.

II.

RE: SECOND APPEAL.

Statement of Case.

The Trustee, William N. Bowie, Jr., while acting as Receiver during the course of the Chapter XI proceedings, operated the principal asset of the debtor corporation consisting of a large apartment complex. The Receiver's appointment and authorization to operate the building was in accordance with the Order of the Referee in Bankruptcy. The Receiver filed a petition before the Referee, upon notice to the Debtor and other parties in interest, requesting authorization to reduce the rent schedule of the apartment complex, established by the Debtor before these proceedings commenced, so that the same would be more competitive with other apartment complexes in the surrounding area. There existed at the time a very large vacancy factor in said complex. At the hearing, the Receiver testified that in his judgment in order for the rents to be competitive with those charged by other apartment houses in the surrounding area it would be necessary to reduce the same. There was no contrary evidence presented, and the Referee determined that the decision was a business decision to be made by the

Receiver in his discretion, and entered an Order authorizing the Receiver to exercise this discretion, provided that he did not reduce the rents more than $10.00 per apartment unit per month. The Debtor petitioned the District Court to review said Order. Thereafter, the Receiver moved the United States District Court to dismiss said Petition for Review (Referee's Order of July 6, 1965) on the ground that the Order had become moot. The supporting affidavit pointed out that the apartment house had been foreclosed upon; that possession thereof had been taken over by United Insurance Company of America; that the Receiver was no longer collecting any of the rents issuing from the premises. These facts were not disputed. The District Court by its Order dated November 12, 1965 and entered November 16, 1965, dismissed the appeal as being moot.

AUTHORITIES AND ARGUMENT.

An Issue Becomes Moot and Therefore No Longer Justiciable Where as a Result of Intervening Circumstances There Are No Longer Adverse Parties With Sufficient Legal Interest to Maintain the Litigation.

Thus where the Receiver in this matter no longer operated the property the issue as to whether he should reduce or not reduce rents resulting from the property was mooted.

Otis v. International Mercantile Co. (CCA 9th, 1938), 95 F. 2d 539;

Brainard v. Kovacevich (CCA 9th 1940), 111 F. 2d 714;

Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, (CCA 7th 1938), 97 F. 2d 223.

III.

RE: THIRD APPEAL.

Statement of Case.

As heretofore indicated, the Receiver took over possession of the apartment complex owned by the Debtor known as the "Kon Tiki Apartments" shortly after his appointment as Receiver on November 10, 1964. After the District Court affirmed the Referee's Order authorizing the first trust deed holder to complete its sale under the terms of its deed of trust, said sale was set and did, in fact, take place on October 21, 1965. The purchaser was United Insurance Company Of America. On October 22, 1965, the day following the sale, United Insurance Company of America by self help, did go into possession of the premises in question and did immediately notify all tenants and all parties to these proceedings in writing thereof. The Receiver made no effort to resist United Insurance Company Of America, but also took no steps to assist them. The Debtor, through its counsel, notified the Receiver and his counsel that the Debtor "does not recognize the validity of said sale and will hold all persons responsible for any violation of its rights whether referred to in Mr. Kelley's said letters or otherwise." Upon the receipt of the foregoing communication from the Debtor, counsel for the Receiver immediately prepared and filed an Application for an Order directing the Debtor and other junior trust deed holders to show cause why the Receiver should not relinquish possession of the premises to United Insurance Company Of America and further prayed that should the Receiver be directed to remain in possession that the Debtor or such other designated party file with the Court suf-

ficient bond to indemnify the Receiver against any damage or other liability to which he may be exposed. Upon notice to all parties, the Referee heard the application at which time he announced that he deemed the Receiver's Application to be in the nature of a request for instructions. At said hearing, the Receiver appeared; United Insurance Company Of America appeared, and the Debtor, though it filed a responsive pleading, did not appear. The Court heard the testimony and other evidence presented and made its Order entered on November 18, 1965. *The Debtor at no time during the course of any of the hearings or in any of the pleadings relative to the foregoing Order cited any case authority in support of its position.*

AUTHORITIES AND ARGUMENT.

The Debtor now contends that the Referee's Order was improper in that he was deciding a moot question. This position completely disregards the fact that the Debtor at the time had advised the Receiver (1) that it did not recognize the validity of the Trustee's sale, and (2) would hold all persons, including the Receiver, responsible for any violation of its rights resulting therefrom.

The Receiver was woefully cognizant of the generally accepted principle of California law that provides: "A Receiver who wrongfully takes possession of property of a third person or withholds possession from such third person without authority may be liable as a trespasser." *Fidelity Savings & Loan Assoc. v. Citizens Trus & Savings Bank*, 200 Pac. 631, 186 Cal. 689.

The Referee and the District Judge found and concluded that United Insurance Company of America

was entitled to possession of the premises. Said finding and conclusion is supported by substantial evidence and should be binding upon this Court.

General Order In Bankruptcy 47:

> "Unless otherwise directed in the order of reference, the report of a Referee or of a Special Master shall set forth his findings of fact and conclusions of law, and the Judge shall accept his findings of fact unless clearly erroneous. . . ."

The Eighth Circuit Court of Appeals in *Teasdale v. Prosperity Co.*, 290 F. 2d 328 (1961) stated:

> "It is a settled rule of this and other courts that the findings of fact by a Referee in Bankruptcy if supported by substantial evidence, are not clearly erroneous; and if approved and confirmed and adopted by the District Court, they will not be disturbed on appeal."

IV.

RE: FOURTH APPEAL.

Statement of Case.

Unfortunately, during the course of these proceedings counsel for the appellant, A. V. Falcone, devoted much of his effort in making personal attacks upon various participants in these proceedings. The initial recipient of these attacks was Hubert F. Laugharn, one of the attorneys for the Debtor at the time of the filing of these proceedings. Thereafter, he was substituted out of the proceedings. A personal attack upon the good faith and competence of Eugene Kelly, attorney for United Insurance Company Of America, was made by A. V. Falcone. A similar attack was at least impliedly

made against Norman W. Neukom, the Referee. When the Debtor was denied an *ex parte* request for continuance A. V. Falcone filed an Affidavit Of Bias And Prejudice against the United States District Judge, Irving Hill. (As a matter of law the same was found to be insufficient.) With this brief background as to the nature of the personalities involved in these proceedings it was not surprising that the Debtor, through its counsel, filed its motion for an Order to remove the Receiver, the Receiver's attorney, and the Receiver's employee, Bernard Crimm. A hearing was conducted on said motion on November 23, 1965. The only evidence presented was the testimony of William N. Bowie, Jr., the Receiver, and a transcript of previous testimony of Mr. Bowie taken on June 21, 1965. Upon the conclusion of the hearing, the attorney for the Debtor announced: "I will have no further questions and I will submit the motion." [Rep. Tr. November 23, 1965, p. 47, lines 21 and 22]. The Referee announced from the Bench that the Debtor's motion was denied. On December 2, 1965, the Debtor filed a "Notice of Motion to Vacate The Referee's Ruling And To Rehear The Matter And To Be Allowed To Introduce Further Evidence." The hearing on this motion to reopen was held on December 13, 1965 and said motion was denied. It was from the Order denying both of the aforementioned motions that the Debtor sought review of the District Court. It is from the Order of the District Court affirming the Referee that this appeal lies. Appellant's brief contains numerous misstatements of fact that are completely unsupported by the record. On page 52 of the brief, a statement underlined by counsel for the appellant stated; "that he (Receiver)

failed and refused to pay real property taxes on the property, accumulating money for the admitted purpose of creating a fund for his Receiver's compensation and fees of his attorney; . . ." It is true that the Receiver, upon the advice of his counsel, refused to pay any real property taxes. This Court should bear in mind that the Referee, after extensive hearings, had determined that there was no equity in the property over and above that which was owed to valid lien creditors upon the subject property. Section 64a(4) of the Bankruptcy Act (11 U.S.C. §104) relating to payment of tax claims provided in part as follows:

> "Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: . . ."

The balance of the accusation referred to above is untrue and completely unsupported by any evidence.

AUTHORITIES AND ARGUMENT.

The Debtor Has No Standing to Move for the Removal of the Receiver, His Attorney or His Employees.

Section 2a(17) of the Bankruptcy Act (11 U.S.C. §11) provides as follows:

> "Courts of bankruptcy may: (17) approve the appointment of trustees by creditors or appoint trustees when creditors fail to do so; and upon *complaints of creditors* or upon their own motion remove for cause receivers or trustees upon hearing after notice." (Emphasis added).

An Appellate Court Will Not Consider Contentions Relating to Rights of Parties Not Parties to the Appeal.

City of Long Beach v. Metcalf (CCA 9th 1939), 103 F. 2d 483.

The Referee's Finding in Effect That No Cause Was Shown for the Removal of the Receiver, His Attorney or His Employee Is a Factual Determination Which Is Not Clearly Erroneous but Has Been Accepted by the District Court and Should Be Accepted by This Court.

General Order in Bankruptcy 47;

In re Harris (9th CCA), 78 F. 2d 849;

Jue v. Bass (9th CCA), 299 F. 2d 374;

Cedar v. Bumb (9th CCA), 344 F. 2d 256.

Moot Questions Will Not Be Considered by the Appellate Court.

All of the issues have in fact become moot in that the Receiver has been superseded by a Trustee in Bankruptcy and no longer has any employees, and is no longer conducting any business.

Brainard v. Kovacevich, supra;

Otis v. International Mercantile Co., supra;

Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, supra.

The Referee Did Not Abuse His Discretion by Denying the Debtor's Motion to Reopen and to Introduce Additional Evidence.

This Court facing the identical question presented in *California Airmotive Corporation v. Bass* (CCA 9th 1965), 354 F. 2d 453, stated:

> "It is apparent that the litigants were, on two separate days, afforded full opportunity for the presentation of evidence. It is also clear that they presented all the evidence which they chose to present until after the Referee had expressed his opinion as to the main issue of dispute, the only issue upon which evidence had been offered during the hearing, and had directed the Trustee to prepare proposed findings, conclusions and order. Then, twenty-nine days later, as has been related, the Petition to Reopen the Proceedings was filed. It is important to litigants and the public alike that there be effective and expeditious disposition of disputes which reach the courts, and this consideration is remarkably important in matters of bankruptcy. As we have previously written, 'in the conduct of any judicial or quasi-judicial hearing, reasonable discretion must be vested in the officer who guides the course of the proceedings.' . . . We could not find an abuse of such discretion absent a strong showing of prejudice to the litigant making the charge of such abuse."

V.

RE: SIXTH APPEAL.

Statement of Case.

The Calland Corporation filed an Original Petition pursuant to the provisions of Chapter XI of the Bankruptcy Act on November 10, 1964. The Referee, in accordance with the duties imposed upon him, did on November 23, 1964, send notice to all creditors of the first meeting of creditors under Chapter XI of the Bankruptcy Act, which notice set forth that a hearing would be held on December 9, 1964 at 2:00 o'clock, P.M. Additionally, said notice provided information as to the time in which creditors had to file their respective claims. The hearing referred to above was conducted and from time to time all matters provided for in the notice were continued. One of said continued hearings was January 12, 1966, at which time the Court set February 11, 1966 as the time when the Debtor was to file its proposed Plan of Arrangement and further set a hearing on said Plan of Arrangement to be held on March 3, 1966. Upon the request of the Debtor, the time to file the Plan was again extended until March 7, 1966, and then again on an additional request to March 25, 1966. The Debtor filed its proposed Plan on March 25, 1966 and the Referee then sent notice to all creditors whose claims were filed in the proceedings as well as to creditors listed by the Debtor in its schedules, and such other parties interested therein. Said notice contained a printed reproduction of the Debtor's proposed Plan and provided

that the hearing for consideration of the confirmation of the proposed Plan was set for April 26, 1966 at 10:00 o'clock, A.M. The notice provided that the Court will consider at that time the confirmation of the Plan and, if the Plan is not confirmed, that the Court would consider whether the proceedings should be dismissed or whether the Debtor should be adjudged a bankrupt and bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act, and that at the time and place of said hearing, the Court would further consider all objections to the Plan, if any. Objections to the Plan were filed by United Insurance Company of America. At the time of the hearing, the Debtor appeared through his counsel, and the Court asked if the Debtor was ready to file its Application For Confirmation Of The Plan. The reply was in the negative. The Court asked the Debtor's counsel if he had any consents of general unsecured creditors to the proposed Plan. The Debtor's reply was again in the negative. The Debtor offered no evidence and the Referee, after reviewing the Plan itself together with the Debtor's failure to file an Application For Confirmation Of The Plan, its failure to file any consents to the proposed Plan, and his failure to tender any deposit necessary in order to confirm such a plan, did as a matter of fact arrive at the opinion that it was in the best interests of creditors that the Debtor be adjudicated a bankrupt and that bankruptcy be proceeded with as provided for in Section 376 of the Bankruptcy Act (11 U.S.C. §776). The Referee further found that the proposed Plan was not feasible. The objections to the Plan of Arrangement were not heard and therefore not determined as a result of those findings.

AUTHORITIES AND ARGUMENT.

That Debtor has cited no authorities, either to the Referee, the District Court, or this Court supporting its position. Section 366 of the Bankruptcy Act (11 U.S.C. §766) provides that the court shall confirm a plan of arrangement only if satisfied that:

(1) The provisions of this Chapter have been complied with;

(2) It is for the best interests of the creditor and is feasible;

(3) The Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

(4) The proposal and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by this Act."

The burden to satisfy the Court as to the matters referred to in Section 366 is upon the Debtor.

In re Credit Service, Inc (D.C. Maryland), 31 F. Supp. 979;

In re Romec Pump Co. (N.D. Ohio E.D.), 31 F. Supp. 389.

In light of the fact that the Debtor failed to offer any evidence whatsoever to support the Plan proposed by it; it failed to make a deposit, as required by the Act; failed to file an Application For Confirmation, as required by Section 362 (11 U.S.C. §762); failed to file the necessary written consents of unsecured creditors to said Plan, a required by said Section, it

appears ludicrous for the Debtor to contend that the Referee abused his discretion in failing to confirm the same.

Upon the Referee's refusal to confirm the Plan of Arrangement he had basically two alternatives: Either to adjudicate the Debtor a bankrupt, or to dismiss the proceedings.

> *Section 376 of the Bankruptcy Act* (11 U.S.C. §776).

The Editors of *Collier on Bankruptcy, 14th Edition, Vol. 9*, at page 494, point out:

> "The interest of the Debtor does not determine the result. In the ordinary case, the interest of the creditors will require that the Court adjudge the Debtor a bankrupt and direct that bankruptcy be proceeded with pursuant to the Act."

VI.

RE: SEVENTH APPEAL.

Statement of Case.

The Debtor filed a motion for an Order directing the Trustee to appear and defend a certain action in the Superior Court. The noticed hearing was set for April 21, 1967. On said date, the Debtor did not appear and counsel for the Trustee requested that the matter be submitted. The Referee refused, however, and stated: "I deem it advisable that I have the benefit of oral argument in connection with this case despite the fact that counsel representing the respective parties have consented to the submission of the matter." The Referee then continued the matter until April 28, 1968 at 1:30 P.M. The attorney for the Debtor by

his letter of April 25, 1967 advised the Referee: "I will not be able to appear in your Court on the 28th instant in the above matter as you fixed in your letter of the 21st instant. I can appear on the afternoon of May 3rd and 4th, 1967." Counsel for Trustee then received a duplicate original letter from the Referee in Bankruptcy advising: "The hearing in the above matter now set for April 28, 1967 at 1:30 P.M. has been continued to May 3, 1967 at 1:30 P.M." The bankrupt did appear at said hearing; introduced no evidence, but referred to various statements made in support of his motion, and the matter was generally argued. At the conclusion thereof, the Referee announced his decision denying the motion and leaving any decision with regard to appearance in the state court action to the sole and exclusive determination of the Trustee and his counsel. The bankrupt thereupon waived any findings of fact and conclusions of law.

The Referee had previously heard an application filed by United Insurance Company Of America entitled; "Application For Order To Show Cause Re Permission To Include William N. Bowie, Jr., Trustee, As Defendant In Quiet Title Action". Hearing was held on said application, at which time the bankrupt was present through his counsel; the Trustee was present through his counsel, and United Insurance Company Of America was present through their counsel. The hearing presented principally two issues: (1) Whether the Trustee could be joined as a party defendant in the state court action for quiet title filed by United Insurance Company Of America, and (2) what action the Trustee should take in the event of such joinder. United Insurance Company Of America contended and urged that

the Trustee be required to file a disclaimer. The bankrupt urged that the Trustee file an answer and set up the fact of the numerous appeals now pending before the Ninth Circuit Court of Appeals as something in the nature of an abatement. The Referee in Bankruptcy, after fully considering the matter, issued his Order, dated December 22, 1966. Said Order provides in part as follows:

> "FURTHER ORDERED, that the application requesting an Order requiring the Trustee when and as a summons and complaint in said quiet title action is served upon him to sign and file in said action a disclaimer of all rights, titles and interest therein be, and the same is, hereby denied without prejudice to the right in said Trustee to take whatever action in connection with said quiet title action he deems appropriate."

Said Order was reviewed by the District Court and approved by its Order of February 28, 1967, which Order is now final. The Referee's Order of May 18, 1967 related to the motion of the Debtor requesting that the Trustee be required to appear and defend the quiet title action referred to in the application filed on November 23, 1966 by United Insurance Company Of America. The Referee, in both of his Orders, specifically refused to direct the Trustee as to what action he should take and left the matter to the Trustee's discretion.

ARGUMENT AND AUTHORITIES.

The Responsibility for Determining Whether or Not the Trustee Should Pursue or Defend Actions in Other Forums Is Upon the Trustee.

"Rights of action arising upon contracts or property of the bankrupt pass to the Trustee, and he is responsible for asserting them in the proper tribunal when necessary for collection and preservation of the estate. He is not required to burden the estate with costs and expenses of litigating a matter where there is no probable cause for believing a right of action exists. *6 Collier, Bankruptcy,* pp. 1744, 1746. Nor does the fact that the Trustee worked under supervision of the Court confer on the Court authority to determine the merits of controversies between the Trustee and third parties which are in the jurisdiction of another forum. *Palmer v. Travellers Insur. Co.,* (CCA 5th 1963) 319 F.2d 296."

Stutts v. Waldrop (CCA 5th 1967), 377 F. 2d 275.

It is respectfully submitted that for the Referee to determine whether or not the Trustee should intervene or defend a Superior Court action in effect would require a predetermination by the Bankruptcy Court of the merits of the controversies between the Trustee and third parties which are in the jurisdiction of another forum.

Conclusion.

The bankrupt in its numerous appeals included herein attacks the propriety of the Rules of the United States District Court for the Central District of California; in particular, Local Rule 218, as well as the conceptual objectives of Chapter XI as viewed by the Referee and the United States District Judge. In fact, Chapter XI is an arrangement proceedings whereby a Debtor is to propose a Plan for the settlement, satisfaction, composition or extension of his unsecured debts. The plan that provides for the straight liquidation and sale of all of the Debtor's property will not usually be entertained, for the same proposes nothing more than a liquidation, which is the purpose of a straight bankruptcy proceedings where creditors are given many protective features that are not necessarily available in a Chapter XI proceedings.

> *In re Pure Penn Petroleum Co., Inc.* (CAA 2d 1951), 188 F. 2d 851.

Secured creditors cannot be dealt with in the sense that their claims may not be extended, modified or altered in Chapter XI proceedings. The Court does, however, have the jurisdiction to restrain enforcement of the liens pending the Chapter XI proceedings. This power, however, must be used only after serious consideration of the reasonableness of the restraint sought and the adequacy of the security of the lien creditor.

The proceedings filed by The Calland Corporation were similar to numerous other Chapter XI proceedings filed within the last five years; *i.e.*, where the debtor's principal occupation was the ownership and operation of an apartment house. The reason for the

filing of numerous similar cases directly results from the real estate depression experienced in Southern California coupled with the nonavailability of new financing to owners or prospective purchasers. The objective, therefore, generally sought was a delay, or postponement of a usually pending foreclosure in the hope that the real estate market would improve; that financing would become available resulting in the sale of the property and creditors paid. In the instant matter, however, the Debtor was able through various tactics to obtain approximately a two year delay of the actual foreclosure of the subject property. It was within this period of time that the Debtor was yet unable to generate new financing or a substantial buyer in order to create the illusory equity that it claimed existed in the subject property. It is respectfully submitted that it is the Debtor and his counsel who misconceived the objectives of a Chapter XI proceedings. It is further submitted that all of the appeals now pending before this Court, in light of the foreclosure of the real property and the adjudication of the Debtor as a bankrupt, have become moot and they should be dismissed.

Respectfully submitted,

SULMEYER AND KUPETZ,
BY ARNOLD L. KUPETZ,
Attorneys for Appellee, William N. Bowie, Jr., Trustee.

Certificate.

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARNOLD L. KUPETZ